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No. 85-1648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL AND MOTEL ASSOCIATION, a non-profit California Corporation,

Petitioners,

v.

PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT LABOR COMMISSIONER

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly found that the Secretary of Labor had authority granted by 29 U.S.C. § 1135 to interpret the statute and define technical terms, such as "employee welfare benefit plan" as distinct from "payroll practices", in regulations which clarify terms in the definitions section of Title I of the Employee Retirement Income Security Act (ERISA).

2. Whether the Court of Appeals was correct in holding that the Secretary of Labor's interpretation of the statute and coverage definitions by rulemaking was reasonable and permissible when it excluded from ERISA's definition of "employee welfare benefit plan" traditional arrangements for vacations by which employees continue to receive their regular pay from the business' general assets while enjoying leave from the workplace.

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BRIEF IN OPPOSITION FOR RESPONDENT LABOR COMMISSIONER

Respondent, PATRICK W. HENNING, and his successor as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, Defendant in the District Court and

Respondent in this Court, submits that Plaintiffs' petition for a writ of certiorari should be denied and files this brief in opposition to the petition.

SUPPLEMENTAL STATUTORY AUTHORITY

Section 505 of ERISA provides:

> [T]he Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations *may define accounting, technical and trade terms* used in such provisions . . . . (emphasis added)

29 U.S.C. § 1135.

SUPPLEMENTAL STATEMENT OF THE CASE

Because the Petition's legal theories take scant notice of the definitional regulation, and the Secretary's authority to promulgate it, the statement of the case ignores the genesis of the exclusion of ordinary vacations from ERISA. The cause of the definition, which resulted in the Petitioner's unhappiness, is the uncertainty engendered by the way the Congress chose to articulate coverage in 1974. Congress passed the Employee Retirement Income Security Act (ERISA) to safeguard employee interests in pensions, and to a lesser extent, welfare benefits, which are provided by what ERISA calls "employee benefit plans." 29 U.S.C. §§ 1003(a), 1002(3). ERISA did not safeguard benefits by setting minimum levels which all employers and unions must provide, in whatever way they choose. Rather, *if* benefits were provided then ERISA required that the "plan" doing so meet certain minimum standards. Plans providing pensions were more severely regulated than those providing welfare benefits. Coverage questions thus focus on what is a plan-providing-benefits covered by ERISA rather than merely what is a "benefit" provided under ERISA.

ERISA protection of employee interests in "welfare benefits" does not come without cost. As Judge Posner summarized [1] in deciding not to resolve whether ERISA covered ordinary vacations, a decision for coverage:

> "would subject all companies with vacation plans to the elaborate requirements that ERISA imposes on plans within its scope, would broadly displace the regulation of vacation benefits by states, and could bring a host of trivial cases into the federal courts."
>
> *National Metalcrafters v. McNeil*, 784 F.2d 817, 823 (7th Cir. 1986)

Such consequencse heigntened interest in the definitions of used for coverage once ERISA was passed in 1974. ERISA had given the technical term "benefit" no generally applicable meaning for all situations, and "plan" was defined recursively.[2] Terms like "vacation benefit" were neither defined nor came from the predecssor statute [3] with a meaning. For example, an arrangement for

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[1] "Employee benefit plans" must meet certain uniform standards. Under 29 U.S.C. § 1002(2)(A) and (2)(B) they must have a written instrument, designated fiduciaries, and a funding policy. Under § 1103(a), (b) and (c) any assets must be held in trust. Sections 1104-13 require fiduciary conduct in the administration of benefits and funds. Under § 1133 there must be a claims procedure with written notice of benefit denials, and opportunity to appeal same. All violations may and some must be remedied in federal court, 29 U.S.C. § 1132(a)(1)(B) and (e)(1), spurred by the possibility of awards of attorneys fees, § 1132(g).

[2] To distinguish an "employee welfare benefit plan" or "welfare plan" from a pension plan, it is defined as a "plan, fund or program . . . established or maintained . . . for the purpose of providing . . . (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits*, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services or (B) any benefit described in [the Taft-Hartley Act] section 186(c) of this title . . . . 29 U.S.C. § 1002(1). (Emphasis added).

[3] The Welfare and Pension Plan Disclosure Act, 72 Stat. 997, 29 U.S.C. § 301 *et seq.* (1976 ed.)

what both parties here concede are "employee welfare benefit plans" which provide "vacation benefits" [4] existed at the time of the Act. The common usage of "vacation" was then, and is now, a leave enjoyed while on the payroll of a one's constant employer.[5]

The resulting uncertainty as to the meaning of "employee welfare benefit plan" in ERISA's definition section led to "numerous inquiries" after the enactment of ERISA. 40 Fed. Reg. 24,642, 2d col. (June 9, 1975). In response, the Secretary used his regulatory authority, which included specific authority to define "technical and trade terms used in such provisions." 29 U.S.C. § 1135. The result was the regulation upheld here, entered in the Code of Federal Regulations under the heading "Definitions of Terms Used In Subchapters . . . § 2510.3-1 Employee Welfare Benefit Plans."

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[4] For example, a funded arrangement for vacations has been described as similar to pensions in that it "provid[ed] accumulated money to a worker for future beneficial use . . .", *Franchise Tax Board v. Construction Laborers' Vacation Trust*, 679 F.2d 1307, 1309 (9th Cir. 1982), *rev'd on juris. grounds*, 103 S. Ct. 2841 (1983). These funded programs exist because members typically work for several employers during the course of a year. 103 S. Ct. at 2844 n.2. Such arrangements are common where a union has organized among many small employers, as in construction and longshore work. Both the trust aspect, and the fact that what the employee is paid is not compensation from any single employer, make such plan a "welfare benefit plan." If the fund did not hold individual accounts in trust, 679 F.2d at 1308-09, but "pooled" them then it also would be covered by the literal language of the cross-reference to 29 U.S.C. § 186(c) for "pooled vacation" arrangements.

[5] Someone on salary at $24,000 per year with two weeks vacation is not said to make a salary of $23,000 with a $1,000 vacation benefit. Nor would a more senior co-worker at the same pay level, who is entitled to month off, be said to make a salary of $22,000 but a vacation "benefit" of $2,000. The senior employee is just said to have a longer vacation (i.e. leave).

In December 1974, the Secretary announced that clarifying regulations would distinguish employers' practices associated with "regular compensation," such as overtime pay, vacation pay, and jury duty pay which "will not subject the employer to any filing or disclosure duties under the Act." 39 Fed. Reg. 42,236 (first col.), December 4, 1974. The regulations which the Secretary proposed six months later distinguished wage arrangements, called "payroll practices", from "welfare benefit plans." 40 Fed. Reg. 24,642-43 (June 9, 1975). Among those asking further clarification were sixty major corporations speaking as the ERISA Regulatory Industry Committee. The Committee proposed to the Secretary a "general rule" which would define an "employee welfare benefit plan" by funding source—i.e., disregarding what specified in § 1002(1)(A) was being provided. (App. K [6] at K-5). The Committee's suggestion was that, if the arrangement providing it were unfunded, uninsured and paid from general assets then it should not be a "welfare benefit plan." (App. K at K-2). As an alternative to such a general rule, the Committee proposed that the definitions of what practices and arrangements were not "plans" be broadened considerably to exclude items which were arguably covered because listed in § 1002(1)(A), but were not truly within Congress' intention. (App. K at K-2; listing at K-3-7). When the Secretary issued final regulations no general definition tied to funding had been adopted. Instead, what was a "welfare benefit plan" had been defined for each element of § 1002(1)(A) which can potentially be the object of an ERISA "plan." Defined as "payroll practices" were vacations and holidays paid out of general assets. 40 Fed. Reg. 34,526, August 15, 1975 and 29 C.F.R. § 2510.3-1(b)(3) (Pet. at 13). Arrangements to provide employees with other items listed in § 1002(1)(A) which were not associated with

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[6] Petitioner's extensive appendices run from A to J, so to avoid confusion, K is Respondent's first.

wages, or were triggered by contingencies such as ill health, were defined as "welfare benefit plans" even if paid from general assets. In making such distinctions, the Secretary said he also considered Congress' purpose in enacting ERISA to cure certain abuses. 40 Fed. Reg. 24,642-3.

REASONS NOT TO GRANT THE WRIT

I.

This decision on vacation pay, like the decisions on severance pay, *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1145 (4th Cir. 1985), *appeal and pet. for cert. filed*, 54 U.S.L.W. 3412 (1985) and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 325 (2d Cir. 1985) appeals filed 54 U.S.L.W. 317d (1985) find that to answer the ERISA coverage question one must decide the legal propriety of the Secretary's regulation defining "employee welfare benefit plan." (770 F.2d at 858, App. B at B-4). The Petition puts the question as if Congress had not granted rulemaking and definitional power in 29 U.S.C. § 1135, and instead had asked courts to construe ERISA's definitional sections *de novo*. See Pet. at 1. However, even the District Court acknowledged the nature of the question in its one-sentence dismissal of the Secretary's authority and regulation. (569 F.Supp. 1544 at 1546, App. C at C-8). Under well-established principles the appropriate standard of review is far less stringent than *de novo* review of a circuit's statutory construction.

The Secretary's definitional regulation must meet the standard of being "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, —— U.S. ——, 106 S.Ct. 455, 461 (1985). *Bayview Homes* rejected an attack on the Corps of Engineers regulatory construction of "navigable waters" and "waters of the United States" to in-

clude not only navigable waters, but also swamps, marshes and bogs adjacent to navigable waters. The regulatory definition was "reasonable" given the Corps technical expertise, the inherent difficulties of defining precise boundaries of water and land, and that the Corps paid heed to Congressional policies behind the Clean Water Act. Here, the formal rulemaking process leading to the Secretary's definitional regulation likewise addressed coverage of ERISA, was based on the Secretary's expertise in compensation matters which encompasses both wages and benefits, and this segment of the definition was expressly based on the Congress' purposes in passing the Act. The Petition does not pretend to show from legislative history that Congress expressed any contrary intent, since no party or court has found any legislative history of any kind on vacation arrangements. Thus the only question before this Court, as it was before the Ninth Circuit, is whether Petitioner can show that the definitional regulation was not reasonable.

It was reasonable for the Secretary to propose a distinction between employee welfare benefit plans and "payroll practices" as to those items in § 1002(1)(A), such as extra pay, sick pay, vacation and jury leave on full pay, which resemble wages and for which Congress has specified a very different regulatory regime under the Fair Labor Standards Act. 29 U.S.C. §§ 202, 218. That reasonableness is not undermined if other elements listed in § 1002(1)(A) which employees are eligible for only upon unforeseen circumstances—e.g., death benefits, severance pay—or which are not wage-like—e.g., medical care, apprenticeship—are not addressed there. The Petition rests its case for unreasonableness (and its later discoveries of conflicts with cases[7] on disability leave,

[7] The District Court cases do not present conflicts within the meaning of Rule 17.1, and so are not discussed. They are unhelpful in discovering the importance of this question because vacation pay is usually a subsidiary question, and often it is not clear whether the vacation arrangement was funded or not.

sick pay and severance pay) on the following characterization of this decision:

> "In finding this regulation to be dispositive of the case, the Ninth Circuit concluded that ERISA's coverage of vacation benefit plans or programs depends *solely* on whether the vacation benefits are financed through a trust fund or through the employer's general assets. Pet. at 24; (Emphasis in original).

However, the Ninth Circuit characterized the line which the Secretary had drawn as "in terms of the *occasion* for payment, the *circumstances* in which it was made, *and* the *source*" (770 F.2d at 860; App. B at B-8.) (Emphasis supplied.) "[T]he funded/unfunded distinction alone" was not the basis (770 F.2d at 863; App. B. at B-18.)

The Petition simply ignores the "occasion/circumstances/source" three-part test.[8]

The three-part nature of the definition is reasonable because it allows the Secretary to better conform to Congress' purposes in passing ERISA. The three elements allow coverage definitions to address the multiple evils which Congress sought to cure. Some evils had to do with the uncertainty of receipt, and others with trustee self-dealing with assets.[9]

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[8] To show "unreasonableness" of a three-part test is much more difficult. It would require a demonstration that some other element in § 1002(1)(A) is furnished to employees under substantially the same "circumstances" and "occasion" as vacation pay, with general assets as it's "source"—and that the Secretary or controlling authority have defined it as an "employee welfare benefit plan." The information for such a demonstration is in the record, for the specific "circumstances" and "occasion" as well as "sources" were laid out in the Secretary's extensive discussion throughout the final rulemaking process. *See, e.g.*, 40 Fed. Reg. 34526-7 (Aug. 15, 1975). The Petition does not even attempt to find such a true contradiction.

[9] As noted at n.3, 770 F.2d at 861; App. B at B-7. In the legislative history cited in n.3, approximately half the plans criticized were welfare benefit rather than pension plans.

The Secretary's consideration of the source of funds as one element in defining "employee welfare benefit plan" is not made unreasonable because now, over a decade after the regulation has served as the settled interpretation of the statute, the Petition suggests that it could easily be evaded by creating a one-dollar trust to act as a conduit for general asset funding in order to make ordinary vacation arrangements an ERISA plan. If such ill-designed attempts [10] appear, the Secretary and the Courts will handle them appropriately.

II.

There is no conflict with decisions of this Court cited by the Petition because none address the coverage issue in this case. Those decisions of other circuits which address coverage support the result here.

The Petition argues that "the Ninth Circuit's general asset distinction is refuted" because of "implicit" or "implied" holdings that ERISA covers all general asset-funded arrangements to pay various medical and disability benefits, *Shaw v. Delta Airlines, Inc.*, 463 U.S.

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[10] Nowhere in the record or the cases cited do such hollow trusts appear. Nothing suggests that when the regulation defines ordinary vacations as those paid "out of general assets" that would not include those where the general assets are passed through a conduit by an agent of the employer, or paid by the employer who "later simply seek[s] reimbursement from the [single-dollar] trust." (Pet. at 26) The assertion that the hollow trust can be established "overnight and funded with *one dollar* without offending any ERISA requirement" (Pet. at 26) is unsupported by caselaw. It clearly raises questions of fiduciary duty if the employer as trustee promises annual vacations to the whole workforce while setting his segregated asset level at one dollar. There is obvious prospective liability for a fiduciary (and the fudiciary's surety) if the employer's stream of general assets are interrupted. Such ingenious criticism based on a hypothetical is like impuning the competence of the superintendent of the Washington zoo because his current taxonomy would fail to clearly consign Pegasus to the aviary or mammal sections.

85, 103 S.Ct. 2890, 2895 (1983), or salary continuation plans during disability, *Russell v. Massachusetts Life Insurance Co.*, —— U.S. ——, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). Pet. at 29-31. But neither case involved vacation arrangements or the regulations at issue here.

In *Russell* the only question considered was whether a fiduciary plan may be held personally liable for extra-contractual compensatory or punitive damages caused by improper or untimely processing of benefit claims. Both parties had acknowledged in the Ninth Circuit that these were benefits provided by a covered plan. 772 F.2d at 485. Respondent Russell had not filed a cross-petition, and therefore did not question the Court of Appeals holding that her state law causes of action were preempted because the defendant was an employee welfare benefit plan under ERISA, 104 S.Ct. at 3088. In *Shaw*, the sole question considered by this Court was whether certain state discrimination laws were preempted by ERISA. 103 S.Ct. at 2895. The opinion never discussed whether the occasion for payment, the circumstances or the source of funding was the key to ERISA coverage. *Shaw* noted that the employer provided the employees with "various medical and disability benefits through welfare plans subject to ERISA," *Id.*, which assumes but does not decide coverage.

Gilbert v. Burlington Industries Inc., 765 F.2d 320 (2nd Cir. 1985), *appeals filed*, 54 U.S.L.W. 3179 (1985) and *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *appeal and pet. for cert. filed*, 54 U.S.L.W. 34122 (1985), far from presenting a conflict, support the Ninth Circuit's conclusion here. Both cases uphold the definitional regulations issued by the Secretary defining coverage, although on a different issue. In both cases, plaintiffs sought the opposite result from this Petition—i.e., that state law was *not* preempted—but based their argument on the same legal theory. Plaintiffs ar-

gued that the "funded/unfunded" source distinction was the *only* proper indicator of coverage, and attacked the Secretary's definition which specified that unfunded severence pay arrangements are employee welfare benefit plans. Plaintiffs said that this difference was not reasonable since vacation pay, when funded from general assets, was not a covered plan. *Gilbert* and *Holland* rejected plaintiffs' premise that *only* the source of payments counts in the definition of an employee welfare benefit plan, following the Ninth Circuit in *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985). *Gilbert* and *Holland* look instead to the occasions and circumstances in which severence pay is due. *Gilbert*, 765 F.2d at 326; *Holland*, 772 F.2d at 1146. Both cases [11] hold unfunded severence benefits to be ERISA covered plans, contrasting vacation pay as appropriately categorized as a "payroll practice." *Id.*

In short, by rejecting the "funding only" attack and upholding the Secretary's definitional regulations on another question, *Gilbert* and *Holland* support, rather than conflict with, this decision.[12]

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[11] Additionally, *Gilbert* and *Holland*, following *Scott*, agree with the Secretary that ERISA's cross-reference to the Taft-Hartley plans does not limit ERISA coverage to "pooled trusts" which provide severence benefits described in 29 U.S.C. § 186(c). This holding that the cross-reference means that certain arrangements other than trusts *can* be provided by a plan covered by ERISA does not logically include a holding that everything not provided by a trust *must* be a covered plan.

[12] The argument that this decision deserves certiorari because of some judicial economy to be gained if the petitions in *Holland* and *Gilbert* are granted as well does not survive a brief look at the questions which those petitioners/appellants present. Should both cases be reversed on the merits, then the decision here would merely have held correctly—that vacation pay is a payroll practice not covered by ERISA—for the wrong reason—reliance on the Secretary's rule making authority. The basic reason that there would be no overlap of issues, beyond the procedural history of the regulations and their rationales, would be the numerous differences between

Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985), is not to the contrary because the language the Petition quotes is not a holding on coverage, but an observation that the parties conceded the issue. *Blakeman* affirms judgment for the employer on the basis that claims for vacation pay based on state law cannot be made when ERISA covers the arrangement for providing vacations. But the opening lines of the decision note that plaintiffs sued on 29 U.S.C. § 1132, ERISA's jurisdiction section, *as well as* asserting state law claims. 779 F.2d at 1147. Plaintiffs sought "the penalty provided by 29 U.S.C. § 1132(c), attorney fees and costs" for "vacation pay" and "violation of the vacation pay plan." 779 F.2d at 1148; see also at 1149. All of these claims are available only when plaintiff asserts that vacations *are* an employee welfare benefit plan, so as to make the defendant a "fiduciary" or "plan." Thus *Blakeman* did not decide the issue in this case, whether ERISA covers ordinary vacation pay; it simply accepted the parties assumptions that it did, and based on them [13] held state claims

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severance pay and vacation pay (and, perforce, California's anti-forfeiture rule regarding vacations) once the merits were reached. Vacations are modest amounts of leave earned by most of the work force, drawn on at intervals throughout the year, usually voluntarily. Severance pay comes all at once for much of the work force and can be in very substantial amounts (i.e., "golden parachutes"). Severance pay protects against an unexpected catastrophe. Vacations are such routine matters that the payroll department handles them, knowing that predictable amounts of annual leave will accrue and the payment will be due when leave is taken. The unpredictable and highly contingent nature of severance pay—which is shared with sick leave, death benefits, etc.—is reflected in common speech which never confuses it with wages. One speaks of an unfortunate friend's "unemployment benefits" and "severance benefits" but not a lucky friend's "vacation benefits."

[13] Thus when *Blakeman* says that "there was little doubt that" everything sought by plaintiffs was from an "employee welfare benefit plan" and cites to 29 U.S.C. § 1002(1) in a footnote, this records *both* parties joint position rather than makes a holding. The "but see" citation to this case, on which a conflict is asserted,

preempted. If *Blakeman* had discussed, confronted and adjudicated the validity of the Secretary's regulation, certainly it would have referenced its own opinion (cited by the Ninth Circuit) which gives the same regulation "great deference." *Abella v. W. A. Foote Memorial Hospital, Inc.*, 740 F.2d 4, 5 (6th Cir. 1984) (per curiam). *Abella* relied on the "payroll practices" regulation to find that an employee could not sue under ERISA for sick leave paid out of general assets.

III.

This decision's one conflict with an interlocutory decision of a state supreme court does not require the grant of a writ because there is no final judgment, and any conflict may otherwise be resolved. *Barry v. Dymo Graphics Systems, Inc.*, 394 Mass. 830, 478 N.E.2d 707 (1985) (App. J) rejects the Secretary's regulation and follows the opinion of the district court below, then remands "for further hearing and the application of the ERISA standard." (App. J at J-22) The remand advised the lower court to decide whether the provisions of the plans were arbitrary and capricious, including consideration whether defendants failed to comply with ERISA's minimum standards, and had interpreted the plan provisions with the proper consideration of the interests of the beneficiaries as required by 29 U.S.C. § 1104(a)(1).

The Petition neither acknowledges that the decision is not final, nor argues that it fits within one of the exceptions in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 Sup. Ct. 1029 (1975). An obstacle of use of any exception would be two tests in *Flynt v. State of Ohio*, 451 U.S. 617, 101 S. Ct. 1958, 1960 (1981). First, the remand for trial under ERISA standards means that other federal law issues will certainly arise between now

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is a reference rather than a rejection. It is better read as an instruction to future litigants not to assume ERISA coverage, as the parties there did before this Ninth Circuit decision.

and final judgment. Second, the holding is not one which a state court is insensitive to an interest whose protection is the special charge of federal courts, but the opposite, over-expansion of federal law. *Compare Belknap, Inc. v. Hale*, —— U.S. ——, 103 S.Ct. 3172, n.5 at 3176 (1983).

One basic fact suggests that this case is not worthy of an exception to the finality rule—the citizens of Massachusetts are unlikely to long toil under an aberrational rule. A series of factors make reversal or reconsideration a likely end to the conflict without granting a writ. The Ninth, Sixth, Fourth and Second Circuits have upheld the validity of the Secretary's definitional regulations generally, and specifically endorsed the "payroll practice" distinction. Massachusetts noted that it had been forced to rule in a peculiar procedural posture—the first presentation of the issue was via defendant's supplemental brief one month before oral argument. (394 Mass. at ——; App. J. at J-21, 22). Thus there were no intermediate state appellate decisions supporting the conclusion, so the state's highest court to rule was also it's first.[14] The plaintiffs, after trial below [15], are free to seek reconsideration or, failing that, certiorari. Plaintiffs' case for gaining review will be somewhat strengthened by a denial of certiorari on this decision, reversing the authority which *Dymo* relies upon. The First Circuit will almost certainly reach the issue [16], either because plaintiffs will sue in federal courts relying on *Dymo*, or an

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[14] The court was further handicapped by having presented to it only two decisions interpreting this unfamiliar federal statute, neither extensively reasoned, and both subsequently reversed. One was the district court here; the other *National Metalcrafters v. McNeill*, 602 F. Supp. 232 (N.D. Ill. 1985), rev'd on other grounds, 784 F.2d 817 (7th Cir. 1986).

[15] We ask judicial notice of the pendency of trial proceedings after remand in the Suffolk Superior Court in Boston, docket No. 79-3666.

[16] No state law says that the Massachusetts Supreme Court may not chose to defer to a federal appellate court, and the treatment of the district court opinions interpreting the federal statute make that likely.

employer who is sued for default on ERISA's requirements will seek to escape the *Dymo* precedent by removal. *Shaw, supra*, 103 S. Ct. at 2899 n.14.

Not only is *Dymo* unlikely to permanently affix a different rule to one state, but it is unlikely to spread such a rule to other states during the interim. It's main authority has been removed by the Ninth Circuit. A similar argument has failed elsewhere.[17] From the Secretary's 1975 rulemaking until the district court opinion below, few litigants showed an interest in challenging this long-accepted distinction. The state and district court cases arose from the confusion engendered by the novel district court opinion in this case. The Ninth Circuit's thoroughly-explained reversal should end whatever temporary confusion has arisen among state courts and lower federal district courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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DATED: May 28, 1986

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[17] The Kansas courts have refused to strike a Kansas statute similar to California's, in response to an *amicus* brief by that state's hospital association, in reliance on the definition of vacation pay from general assets as outside the scope of an employee welfare benefit plan. *Richardson v. St. Mary's Hospital*, 267 P.2d 1143, 1146, 6 Kan. App.2d 239 (1981).

APPENDIX K

Excerpts of Comments Submitted on Behalf of the ERISA Regulations Industry Committee (ERIC) in Response to the Notice of Proposed Rulemaking Published in the Federal Register of June 9, 1975

APPENDIX K

VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

202 298-6445

July 8, 1975

Office of Employee Benefits Security
Labor Management Services Administration
U.S. Department of Labor
200 Constituiton Avenue, N.W.
Washington, D.C. 20216

Re: Notice of Proposed Rulemaking Concerning Reporting and Disclosure Under The Employee Retirement Income Security Act of 1974; 40 FR 24621, June 9, 1975.

Dear Sir:

These comments regarding the proposed regulations on reporting and disclosure under ERISA are submitted on behalf of the ERISA Regulations Industry Committee (ERIC), an ad hoc industry group composed of sixty major corporations, each of which maintains one or more plans affected by the notice of proposed rulemaking published in the Federal Register of June 9, 1975. For convenience, these comments, which reflect the consolidated views of ERIC members, have generally been arranged in the order of the proposed regulations and not necessarily in the order of their importance.

* * * *

EXCERPT

* * * *

Section 2510.3-3 *Employee Benefit Plans*

2. General Comment On Excluded Practices and Arrangements

We concur with the rationale found in the proposed regulation for not listing all possible plans, practices or arrangements that are not intended to be covered by the reporting and disclosure provisions of Title I of the Act.

However, the term "employee welfare benefit plan," as defined in Section 2(1), should not includes the type of benefits outlined in Section 3(1) if such benefits are unfunded, uninsured and are paid from the general assets of the employer. This suggested generalized rule is consistent with the intention of Congress and within the authority of the Secretary of Labor under Section 505 of the Act, and will be more workable than the use of a long list of exclusions which will be subject to continuous modification and varying interpretations.

However, it is imperative if such a generalized rule of exclusion is not adopted, that the listing of excluded practices or arrangements be broadened considerably to include more of the plans, practices and arrangements that clearly were not intended by the Congress to be covered by the Act. An unreasonable interpretation in this critical section of the regulation can turn an Act intended to provide in part meaningful and constructively useful information to participants into a costly, burdensome, administrative nightmare for plan sponsors in communicating a host of details to participants which will be of little real value to them.

Alternatively, we offer the following comments and additions to those plans, practices and arrangements excluded from coverage in Section 2510.3-3.

3. Shift and Holiday Premiums
(Section 2510.3-3(b)).

In keeping with the preamble relating to proposed Section 2510.303(b) the term "weekend premiums" should be added to this paragraph. This addition would be consistent with the intent of the paragraph, and at the same time would be identical to the types of payments excluded in the "holiday premium" category.

4. Bonus Program
(Section 2510.303(h)).

The word "automatically should be substituted for the word "systematically" in the exception to the rule exempting bonus programs and the words ". . . to the termination of covered employment or beyond, or . . ." be *deleted.* While there may be a "system" for deferring bonus payments which might result in some payments occurring after termination of employment, the critical factor would seem to be the automatic nature of the provision in deferring income into the retirement years.

Also, bonus payments that are not deferred to provide retirement income but may be payable upon termination of employment, before or after retirement, and should not be treated as employee benefit plans because they are associated with regular wages or salaries.

5. Informal Policy on Absences
(Section 2510.3-3(1)).

We concur with the basic intent of this paragraph as stated in the preamble, i.e., to include those practices or arrangements which provide pay continuance on account of occasional short absences for personal reasons. However, the word "Informal" in the paragraph heading should be *deleted* since it is not only imprecise, but also seems somewhat irrelevant to the paragraph's intent.

Besides being difficult to determine whether a policy is formal or informal, the language could work to the detriment of employees in cases where employers decide: (1) to maintain an informal policy instead of formalizing it; or (2) to change a formal policy to an informal policy to avoid reporting requirements of the Act.

Additionally, for clarification purposes, the wording beginning—"but with no commitment . . . etc." should be *deleted;* substituting—"such as time off for doctor's visits and other personal reasons." This is suggested because there may well be a commitment to continue pay during such short absences. Absent clear legislative intent, this practice should not be the deciding factor in whether such an employer arrangement should be considered a covered employee benefit plan.

6. Paid Sick and Vacation Leave (Section 2510.3-3(m)).

We concur with the rationale for including both paid sick leave and paid vacations in the listing of plans not subject to Title I.

For the same reasons, Section 2510.3-3 should include a new sub-section on *paid holidays.* Paid holidays are clearly associated with regular wages or salary rather than benefits triggered by other contingencies. As noted in the preamble, there is no indication that Congress intended to cover holiday pay under Title I.

Additionally, the word "normal" modifying "compensation" should be *deleted.* The current wording implies that reporting would be required if *more* or *less* than normal compensation is paid during a vacation or illness. From a substantive point of view, it would be irrelevant whether or not normal compensation is paid. Many sick leave programs do not continue full (normal) compensation during the entire period of absence. For example, a program could provide for full pay for a

specified number of weeks, then half pay for a further number of weeks, with the length of either or both periods being contingent on the employee's length of service.

In addition, the phrase "normal compensation" would discriminate against those paid sick leave plans which recognize that sick pay is subject to certain favorable tax considerations, and thus adjust the amount of "normal compensation" to some percentage of gross pay that will result in approximately the same net after tax income to the employee.

The current wording would also discriminate against those plans which provide additional vacation pay to encourage off-season vacations.

It is further suggested that excluded payments not be limited to sickness but rather that the paragraph be amended to exclude payments for any disability, whether due to sickness *or* injury.

7. Certain Group Insurance Programs (Section 2510.3-3(p)).

While we concur that it would serve no useful purpose to cover certain insurance programs under Title I of the Act, it is not clear why these insurance programs must be "group" arrangements. The phrase "group insurance" commonly refers to an employee benefit arrangement with benefits guaranteed by a contract which meets the laws of the state as a group insurance contract.

There are other legally permissible insured mechanisms which permit the so-called mass marketing of *individual* policies to employees with the employer serving only as a conduit to pass the premiums on to the insurer.

Accordingly, the title of the subparagraph should be expressed as "Group or Employee Wholly Paid Insurance Programs."

Moreover, it should be noted that the *fifth* condition for the exclusion from coverage under Title I of a group insurance program is that the employer make "no representation" to employees that the insurance is "a benefit of employment."

This *fifth* condition should be *deleted* because: (1) most employees look on the payroll deduction, lower group rates, and other arrangements associated with employee pay-all insurance programs as a convenience and advantage; and (2) many employers would consider such arrangements as a part of the employee benefit program, and employers generally assist in enrolling interested employees.

8. Plans Without Employees (Section 2510.3-3(q)).

It is reasonable to interpret the exemption for "plan without employees" to include unfunded supplemental pensions payments for retired employees because individuals under such arrangements are no longer employees.

Such an exemption for such pension supplementals which are unfunded and which are paid prior to Social Security retireemnt age should be spelled out more clearly in this paragraph or should be set forth more completely in a separate paragraph under Section 2510.3-3.

9. Recommendations For Exclusion of Other Plans From Title I

There are several other major employee benefit plans, programs or arrangements that have a common denominator with the proposed excludable employee benefit programs and which, based on the rationale contained in the preamble to the regulations, should be excluded from Title I. These programs and arrangements should not be considered employee benefit plans under the Act because they are associated with regular wages and salaries rather than benefits triggered by other contingencies. While the listing set forth below is by no means complete

(and should not be for the reasons cited in the preamble), the following additional items should be added—individually or collectively—in the list of plans *not* covered under Title I:

(a) funeral leave or death in family absences;

(b) all military pay or military leave programs;

(c) tuition refund and similar employee (or dependent) scholarship assistance programs;

(d) all unfunded programs that provide continued income replacement benefits upon termination of employment, paid from general employer assets and payable only prior to the date of eligibility for full or reduced Social Security old age benefits and before normal retirement age;

* * * *